IN THE IMMIGRATION APPEAL TRIBUNAL

Heard at:	Field House	:	
Heard on:	1st August 2003	Appeal number:	**_A (UNDERSTANDINGS TO RETURN TO KAZ) IRAQ CG [2003] UKIAT 00118**
Date typed:	1st August 2003		
Date promulgated:	30th October 2003		

The IMMIGRATION ACTS

Before:

MS. D. K. GILL (CHAIRMAN)
MR. M SHRIMPTON

Between:

The Secretary of State for the Home Department — Appellant

And

DETERMINATION AND REASONS

Representation:

For the Secretary of State: Ms. J. Webb, Senior Home Office Presenting Officer.
For the Respondent: Ms. C. Kilroy, of Counsel, instructed by Gill & Co. Solicitors.

1. Mr. A (who we shall hereafter refer to as the Claimant) is a national of Iraq, aged about 27 years. He arrived in the United Kingdom on 23rd February 2001, having left Iraq on 9th February 2001. His appeal was allowed on asylum and human rights grounds by an Adjudicator (Ms. J. Coker, sitting at Taylor House) following a hearing on 20th January 2003. He had appealed against the decision of the Secretary of State of 1st May 2001 to refuse leave to enter the United Kingdom.

2. The Claimant is an Iraqi Kurd from a place in that area of Iraq which was formerly known as the Kurdish Autonomous Area of Northern Iraq (to which, for the sake of convenience only, we shall refer to as the KAA). The Adjudicator allowed his appeal solely because she proceeded to determine the risk on return on the basis that the Secretary of State would return him to southern Iraq.

3.1 There were several issues which arose before us. We set out below, under separate headings, each of the issues, a summary of the submissions made, our decision in relation to each issue and our reasons.

3.2 Before proceeding any further, it is appropriate that we mention at this stage that:

(i) in paragraphs 26 to 31, the Adjudicator assessed the credibility of the Claimant's claims as to his past experiences in the KAA. She made findings

of fact. These were not challenged, until a very late stage. Indeed, it was only at the hearing before us that Miss Kilroy applied for permission to cross-appeal these findings of fact.

(ii) in paragraphs 32 to 33, the Adjudicator assessed the risk on return on the basis that the Claimant would be returned to southern Iraq and gave the reasons why she was assessing the risk on return on this basis. Leave to appeal was granted in relation to this aspect of the Determination.

3.4 Our decision as to the issues mentioned under the headings (below) of "Removal directions", "Application to admit new evidence and to cross appeal" were delivered at the hearing, for reasons which we give in this Determination. Our decision as to the "Risk on return" was reserved. We give our decision, and our reasons for our decision, in relation to the risk on return in this Determination.

The removal directions:

4.1 The Notice of the decision (form IS82E) to issue removal directions states:

> *"I have given/propose to give directions for your removal by a scheduled service at a time and date to be notified to (country/territory) IRAQ"*

4.2 The Adjudicator's Record of Proceedings (ROP) records the following at the end of oral evidence and before the commencement of submissions:

> *Please ensure you address me on issue of return, rd's to Iraq*
>
> We take "rd's" to mean "removal directions".

The ROP then records the Presenting Officer's submissions. Towards the end of the Presenting Officer's submissions, the ROP records:

> *From KAA. That is where would be seeking to return him. As a resindet [sic] there no probs [sic] of him being accepted. I understand not being returned at preent [sic]. Returns no [sic] currently taking place cos mechanism not in place. Would be safe to reurn [sic] to KAA as soon as that ecomes [sic] possible.*

4.3 At paragraphs 20 and 33 of the Determination, the Adjudicator stated:

> *20. I specifically asked both representatives to address me in their submissions as to what in their view would happen if the appellant were to returned to Iraq. The respondent stated that the [Claimant] was from the KAA and that is where they would be seeking to return him. She said that she understood that there were no returns at present as there was no mechanism in place and that he would be returned to KAA as soon as it becomes possible.*
>
> *33. The IS82E states that removal would be to Iraq, not Iraq (KAA). There was no undertaking in the papers before me from the respondent that the [Claimant] would not be removed to Iraq unless and until he could be removed safely to the KAA. I have noted the respondent's statement that, contrary to the IS82E, the respondent would be seeking to return the [Claimant] to the KAA and that she understood that there were no removals taking place at the moment. Unlike Gardi* [01/TH/2997] there was no express undertaking offered or given by the respondent not to return this [Claimant]; merely "an understanding" by the respondent's representative that removals were not taking place "at the moment". This was despite my specific request that the issue of return be dealt with in submissions. The IS82E in this case pre-dates Gardi*. It has not however, despite the comment of the Tribunal at*

paragraph 19 ("We find it quite extraordinary that an explicit undertaking has still not been given and the directions for removal still refer to a scheduled flight") been amended nor has an undertaking been given. Paragraph 23 of Gardi states that it is apparent that an undertaking not to return has been given by the Secretary of State if he is unrepresented. The Secretary of State was represented in this case. In the absence of an express undertaking* ***I find that the [Claimant] will be returned in accordance with the IS82E namely to Iraq and not Iraq (KAA).*** *He will be at risk of persecution on such return."*

(Our emphasis)

4.4 According to the transcript of the Tribunal's Determination in Gardi* which has been submitted the us, the relevant parts of the Tribunal's Determination are paragraphs 18 and 22(3) – and not paragraphs 19 and 23 as stated by the Adjudicator (there was, fact, no paragraph numbered 23 in that Determination). We now set out paragraphs 18 and 22(3) of the Tribunal's Determination:

18. [Referring to the report approved by the then Minister, Barbara Roche, on 26 March 2001] That hardly amounts to an undertaking that in every case a removal direction will not be put into effect until some means can be found to avoid Baghdad, particularly as the Secretary of State has chosen to refer to a scheduled flight. If a HOPO has attended the hearing before the Adjudicator, an express undertaking is often given. Judging from Paragraph 4.4 of the adjudicator's determination in this case, the HOPO did not give such an explicit undertaking. We find it quite extraordinary that an explicit undertaking has still not been given and the directions for removal continue to refer to a scheduled flight. It is even more extraordinary that where a HOPO has not been provided the undertaking is not sent in writing. ***We strongly suggest that problems will be avoided if an explicit undertaking is given and the removal directions are changed*** *so it is clear that return is being directed to the KAA part of Iraq. An adjudicator should accept any explicit undertaking given in an individual case.*

22(3) ***Since it is by now apparent that an undertaking not to return to Baghdad is given,*** *if the Secretary of State is unrepresented, the Adjudicator should not assume that a return will be to a part of Iraq other than the KAA without giving the Secretary of State the opportunity of clarifying the position.*

(our emphasis)

4.5 At the hearing before us, Ms. Webb essentially relied on the grounds of application. She submitted that the Presenting Officer had adequately answered the Adjudicator's request to be addressed on the removal directions. In any event, Ms. Webb gave the Tribunal an express undertaking that the Claimant would only be returned, if and when it is possible to do so, to the KAA.

4.6 Miss Kilroy submitted a detailed Skeleton Argument. Essentially, she contended that the Tribunal in Gardi* stated that an explicit undertaking is required in each case that the Secretary of State would only return an applicant, if and when he is able to do so, to the KAA. This is apparent from paragraph 18 of the Determination in Gardi*. Paragraph 22(3) of the Determination in Gardi* does not apply in this case, because the Secretary of State was represented before the Adjudicator. When the Adjudicator had asked the representatives to address her on the issue of risk on return in relation to the removal directions, it was perfectly clear, in Miss Kilroy's submission, what she had meant by that. It was clear that the Adjudicator was asking for an explicit undertaking. Miss Kilroy was able to say so because she was present at the hearing before the Adjudicator. Nevertheless, the Presenting Officer had failed to give the Adjudicator the explicit undertaking. In these circumstances, the only conclusion the

Adjudicator could draw was that return would take place to southern Iraq. In paragraph 14 of the Skeleton Argument produced to the Tribunal, it is requested that the Tribunal dismisses the Secretary of State's appeal and upholds the Adjudicator's Determination, without re-examining the Claimant's claim in the light of the changing circumstances in Iraq. Paragraph 14 of the Skeleton Argument states that, in this regard, reliance is placed on the fact that, if the Claimant had brought an action for judicial review of the Tribunal's decision to grant leave and had succeeded, the decision of the Adjudicator would have been "left as it was". At paragraph 19 of the Skeleton Argument, it is asserted that it is for the Secretary of State to show that the cessation provisions (under Article 1(C)) apply in this case – that is, that the conditions which led the Adjudicator to find that the Claimant was entitled to refugee status not longer subsist.

4.7 It is clear, from the Adjudicator's Determination, that she proceeded to assess the risk on return on the basis that, in the absence of an explicit undertaking, the Secretary of State intends to return the Claimant to southern Iraq. But that is simply not correct. The Secretary of State has no such intention, and did not have any such intention as at the date of hearing before her.

4.8 That this is so must be abundantly clear, not only from the Tribunal's Determination in Gardi* itself but also from the several Tribunal Determinations involving Iraqi nationals which have been promulgated since. The Presenting Officer at the hearing before the Adjudicator did not say anything, in response to the Adjudicator's request to address her on the risk on return, which suggested a contrary intention.

4.9 It would appear that the Presenting Officer at the hearing before the Adjudicator did not appreciate that the Adjudicator was asking for an explicit undertaking. Miss Kilroy informed us that she had been present at the hearing and was able to say that it was abundantly clear what the Adjudicator had meant when she asked to be addressed on the risk on return. To this, we have to say two things. Firstly, Miss Kilroy is not in the position to give evidence. Had she wished to do so, she should have submitted a written statement, advised the Claimant that she was not able to represent him and then made herself available for questioning at the hearing. Secondly, it is not at all clear, from the ROP itself, that the Adjudicator had made clear that what she was seeking was an "express undertaking", with the use of these very words. The ROP records that she simply said: "*Please ensure you address me on issue of return, rd's to Iraq"*.

4.10 In Miss Kilroy's submission, there was no need for the Adjudicator to ask expressly for an undertaking and the fact that she did not expressly ask for an undertaking does not vitiate her decision to determine the appeal on the basis that return would take place to southern Iraq. We would say that the Presenting Officer's response (that the Secretary of State would be seeking to return the Claimant to the KAA) was adequate, bearing in mind the vagueness of the Adjudicator's request to be addressed on the removal directions. It was not clear, from her request to be addressed on "*the issue of return, rd's to Iraq*", that she was asking whether the Secretary of State would be prepared to give an express *undertaking*, as such. We all know, from the nature of the work we do, that, unless a question is properly and clearly phrased, the answer may not be to the point the questioner was seeking to have addressed.

4.11 As is abundantly clear from the Tribunal's Determination in Gardi as well as all cases involving Iraqi nationals since, which have been considered by the Tribunal, the intention of the Secretary of State is to effect returns, when and if it is possible to do so, to the KAA only. There is no reason so suppose that, whilst the Secretary of

State had given explicit undertakings in other Iraqi cases, he would not have done so in this particular case, if the Adjudicator had made it clear that she was seeking an "explicit undertaking".

4.12 The Adjudicator made a finding in paragraph 33 that "*the Claimant will be returned in accordance with the IS82E namely to Iraq and not Iraq (KAA)"*. It is clear, from her Determination (see paragraphs 32 and 33 of the Determination) that she was making a finding that the Claimant would be removed to southern Iraq. This finding is simply unsustainable, on the evidence which was before the Adjudicator. The relevant evidence, for this purpose, is not only the evidence which was before the Adjudicator in terms of this particular appeal but also what is known generally about the Secretary of State's intentions, from the Tribunal's Determination in Gardi and succeeding cases involving Iraqi nationals. There can be no doubt as to the Secretary of State's intention in this connection. Indeed, Miss Kilroy did not seek to persuade us that there was any doubt as to the Secretary of State's intentions. Her submissions on this point were directed towards persuading us that, given that an "explicit undertaking" had not been given to the Adjudicator as (she asserted) had been requested by the Adjudicator, the Adjudicator was entitled to proceed to determine this appeal on the basis that return would take place to southern Iraq.

4.13 It can also be said that the Adjudicator proceeded on a misapprehension of a material fact – namely, as to the intention of the Secretary of State.

4.14 Gardi* is not authority for the proposition that, where the Secretary of State is represented but, for some reason, the Presenting Officer does not give "an explicit undertaking" and merely states the place to which the Home Office would be seeking to return a person, the Adjudicator is entitled to find that return would be made to southern Iraq. The words in paragraphs 18 and 22(3) of the Determination in that case which we have emboldened in paragraph 4.4 above do *NOT* support that proposition.

4.15 Accordingly, we are satisfied that we must set aside the Adjudicator's determination of the appeal as set out in paragraphs 32 to 39 of the Determination – either because the Adjudicator's finding that return would take place to southern Iraq is unsustainable on the evidence or, alternatively, because she proceeded to determine the appeal on a misapprehension of a material fact.

4.16 Finally, we would note that, with regard to paragraph 14 Skeleton Argument, an application for judicial review of the Tribunal's decision to grant leave was apparently not made. It would not be appropriate for us to surmise what would have been the outcome of any such application. The fact is that an application was not made, for reasons which we have not been told. The contentions in paragraph 19 of the Skeleton Argument are misconceived. The Claimant has not been granted refugee status. His appeal was allowed by the Adjudicator, either on the basis of a finding which was unsustainable or on the basis of a misapprehension as to the intentions of the Secretary of State. Article 1(C) has no application in this case.

Application to admit new evidence and to cross-appeal:

5.1 An application had previously been made in writing (by way of a letter dated 23rd June 2003 from the Claimant's solicitors) to call the Claimant to give oral evidence at the hearing. Unfortunately, this request was placed before a Vice President for a decision. The application was made on the basis that, due to the changed circumstances in Iraq following the recent war in Iraq, revenge attacks are being carried out in Iraq on persons who were associated with the Ba'ath party and their

families. The Claimant had also submitted a recent statement dated 9th June 2003 in which he referred to attacks being carried out on his house in Baghdad and his mother and sisters in Baghdad. He says in his statement that he does not know where his father is and that his brothers have fled to Iran.

5.2 We heard submissions as to the relevance of the new evidence. Miss Kilroy submitted that the new evidence was relevant in that:

(a) the new evidence relates to a new "head of claim" being made by the Claimant which is based on the change of circumstances in Iraq following the war. Miss Kilroy requested that the appeal be remitted for re-determination on this basis (see also paragraph 18 Skeleton Argument), with a direction that the appeal should not be heard until the situation in Iraq becomes clearer.

(b) the new evidence throws the findings of the Adjudicator at paragraphs 26 to 31 into doubt. Although the phenomena of revenge attacks being carried out on those associated with the Ba'ath party and their families has only arisen since the war started in March 2003 (that is, after the hearing before the Adjudicator took place in January 2003), the new evidence as to revenge attacks (if accepted) shows that it is entirely possible for persons who have been associated with the Ba'ath party to experience problems many years later. One of the problems the Adjudicator had had with the Claimant's accounts is that she did not find it credible that the family of Qadir or the KDP would have waited six years to shoot the Claimant.

Miss Kilroy therefore applied at the hearing before us for leave to cross appeal the Adjudicator's findings of fact at paragraphs 26 to 31 of the Determination. If we were with her on this issue, Miss Kilroy requested that the appeal be remitted for a re-determination, with a direction that it should not be heard until the situation in Iraq becomes clearer.

(c) the new evidence is relevant to assessing the risk on return to the KAA.

In Miss Kilroy's submission, (a) and (c) were not dependent on whether leave to cross-appeal was granted.

5.3 Dealing first with the issue of the application for leave to cross-appeal, we noted that no notice of the intention to make an application to cross appeal had been given. Whilst we noted that the appeal before the Adjudicator was heard in January 2003 (that is, before the start of the war in March 2003), the fact remains that the application for leave to appeal was being made very late, given that the Ba'ath party regime was toppled in May 2003. Furthermore, the Claimant's statement only refers to attacks in Baghdad. The Claimant would, however, be returned to the KAA. Our attention was drawn to incidents of revenge attacks but these related, in the main, to Baghdad. There were no reports of revenge attacks on the KAA. Furthermore, there was nothing in the objective evidence to which our attention was drawn which persuaded us that, even if the Claimant's claims concerning the attacks in Baghdad were true, there was a reasonable likelihood that the attacks in Baghdad had anything to do with father's activities for the Ba'ath party, as opposed to the general mayhem, violence and looting which accompanied and followed the allied action in Iraq. We were not persuaded that the late application for leave to cross appeal had an arguable prospect of success. For all of these reasons, leave to cross-appeal was refused.

5.4 In so far as reliance was placed on the new evidence as a "new head of claim", we refused to admit the new written evidence and permit the Claimant to be called to give oral evidence. Given that the Claimant was raising a new head of claim which is said to arise following the recent war in Iraq, the appropriate step is for a fresh application to be made to the Secretary of State on asylum and human rights grounds.

Risk on return

5.5 In so far as the new evidence was said to be relevant to the assessment of the risk on return to the KAA, we noted that the Claimant's statement refers to attacks in Baghdad. We are invited to draw two inferences: firstly, that these attacks are reasonably likely to be connected to his father's activities for the Ba'ath party; and, secondly, that it is reasonably likely that the Claimant would be the subject of revenge attacks in the KAA.

5.6 However, as we have said above, given the general mayhem, violence and looting which accompanied and followed the allied action in Iraq, we considered that it is speculative to suppose that these attacks were connected to the Claimant's father's activities for the Ba'ath party. In any event, as we have said above, the objective evidence to which our attention was drawn related to incidents of revenge attacks which took place mainly in Baghdad. We specifically asked Miss Kilroy to refer us to evidence which shows that revenge attacks were taking place in the KAA. She was unable to do so, but submitted that this may be due to the fact that journalists are concentrating on the situation elsewhere in Iraq and that the absence of any reports of revenge attacks in the KAA does not mean that they are not taking place in the KAA or are not reasonably likely to take place in the KAA. However, given the complete absence of any reports of such incidents in the KAA and given, further, that the general situation in the KAA is and has been different to the situation in the rest of Iraq, we consider that it is speculative to suppose that revenge attacks are taking place or are reasonably likely to take place in the KAA.

5.7 Miss Kilroy also relied on the general situation of chaos in Iraq as a whole to support her contention that it would not be safe to return the Claimant to the KAA. In this connection, she relied on the letter from the UNHCR dated 1st July 2003 and the fact that the Home Office has suspended consideration of asylum applications from Iraqi nationals. These show, in her submission, that it is unsafe to return Iraqi nationals to Iraq. We noted that the UNHCR's letter, which is clearly based on the general situation of chaos in Iraq due to the war, makes reference, inter alia, to the high incidence of violent crimes and the dependency of large parts of the population on food and other assistance for their survival and the absence of functioning and legal structures in much of Iraq. There are two points we would make in relation to the UNHCR's letter and the suspension by the Home Office of any consideration of asylum applications by Iraqi nationals. Firstly, the UNHCR's letter and the suspension by the Home Office are relevant pieces of evidence in order to assess the risk on return. However, they do not, of themselves, enable the Claimant to succeed in his asylum and human rights claims. Secondly, the UNHCR's letter acknowledges that the situation in Iraq may vary from one part to another. The Claimant, as we have said, would be returned to the KAA, where the situation is very different to the rest of the country.

5.8 The Adjudicator was prepared to accept that the Claimant was shot in 1995 (paragraph 26 of the Determination) but she found that this was not as a result of any activity by his father (last sentence of paragraph 27 of the Determination). She did not believe the Claimant's claim that he had suffered threats. She found that he had

not been threatened and he did not have problems between 1995 and 2001 (paragraph 28 of the Determination). She did not believe that the attempted shooting in 2001 took place and stated that, if it did take place, it was a random shooting not directed at the Claimant and for which he was not the target (paragraph 30 of the Determination). She found that the Claimant was not persecuted before he came to the United Kingdom (paragraph 31 of the Determination). Although she did not make a specific finding as to the Claimant's claim that his father was a spy for the Ba'ath party, it would appear that she proceeded on the assumption that this was true. Although we recognise that the war in Iraq has resulted in changes taking place in the KAA (particularly, with regard to the systems in place for the governing of Suleimaniya and Arbil), we are satisfied (bearing in mind the absence of any reports of revenge attacks in the KAA and the Adjudicator's findings of fact) that there is no reasonable likelihood that the Claimant would, if returned to the KAA, experience problems which are sufficiently severe as to amount to persecution or treatment in breach of Article 3 of the ECHR. Of course, no guarantees can be given but we make it clear that we have assessed the likelihood of any risk on the low standard of a reasonable likelihood.

5.9 We did not consider it necessary to remit this appeal to another Adjudicator for consideration of the risk on return to the KAA. Given that the Adjudicator's findings of fact as to the Claimant's claimed experiences in the KAA were clear, we considered that we were able to determine the risk on return ourselves, based on the evidence before us.

5.10 Finally, with regard to the assertion in paragraph 16 of the Skeleton Argument that the country information on the IND website has not been updated, Ms. Webb informed us at the hearing that there was a new Bulletin on Iraq numbered 3A/2003. However, unfortunately, Ms. Webb only produced this document at the very end of the hearing. We considered that it would be unfair for us to accept this document at such a late stage and we therefore excluded this document.

6. For the reasons we have give above, we must allow the appeal of the Secretary of State.

Decision

The appeal of the Secretary of State is ALLOWED.

Ms. D. K. GILL
Vice President

Date: 18th August 2003